UNITED STATES
v.
JERRY E. FRANKLIN

IBLA 86-424 Decided September 22, 1987

Appeal from a decision of Administrative Law Judge Mesch, finding the Statler Mine Nos. 1 and 2 lode mining claims (OR 012785 and OR 030438) invalid for lack of discovery of a valuable mineral deposit.

Affirmed.

1. Evidence: Prima Facie Case -- Mining Claims: Contests

When the Government contests a mining claim alleging lack of discovery of a valuable mineral deposit it has the burden of going forward with sufficient evidence to establish a prima facie case. When a Government mineral examiner testifies that he has examined a mining claim, and, based upon his examination, concludes the quantity and quality of the minerals is insufficient to support a finding of discovery, a prima facie case is established.

2. Mining Claims: Contests

Government mineral examiners are not required to perform discovery work for claimants or explore beyond a claimant's exposed workings. It is therefore incumbent upon a mining claimant to keep his discovery points available for inspection by Government mineral examiners. When a mining claimant fails to do so, he assumes the risk that the mineral examiner will be unable to verify a discovery. In such case an unsupported allegation that the samples taken by the examiner were not representative of the mineral deposit will not overcome a prima facie case that there is no discovery.

3. Mining Claims: Discovery: Generally

Evidence of the existence of mineralization which may encourage further exploration to determine the existence of minerals of such quality and quantity as would

justify the expenditure of funds for the development of a mine does not establish the discovery of a valuable mineral deposit.

4. Contests and Protests: Generally -- Mining Claims: Generally -- Mining Claims: Contests -- Mining Claims: Determination of Validity -- Rules of Practice: Government Contests

The motivation of a Government agency initiating a contest against mining claims is irrelevant. The fact that such contest challenges the validity of certain mining claims and not of others in the same general area does not constitute a denial of due process. The Board of Land Appeals cannot abnegate its responsibility to determine the validity of mining claims when that issue is presented upon appeal. When that issue is properly presented, mining claims are properly declared null and void upon a showing of lack of discovery of a valuable mineral deposit within the claims.

APPEARANCES: J. Marshall Gilmore, Esq., John Day, Oregon, for appellant; Jim Kauble, Esq., Office of General Counsel, U.S. Department of Agriculture, Portland, Oregon, for respondent.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Jerry E. Franklin has appealed from a decision of Administrative Law Judge Robert W. Mesch, dated January 31, 1986. In his decision, Judge Mesch found the Statler Mine Nos. 1 and 2 lode mining claims (OR 012785 and OR 030438) to be invalid because they were not supported by the discovery of a valuable mineral deposit at the time of the hearing.

The Statler Mine Nos. 1 and 2 lode mining claims are located in secs. 8 and 17, T. 10 S., R. 34 E., Willamette Meridian, Grant County, Oregon, which is a part of the Umatilla National Forest. The Statler Mine No. 2 lode mining claim had been conveyed to Franklin by quitclaim deed dated October 12, 1978. However, Franklin failed to comply with the mining claim recordation requirement of 43 U.S.C. § 1744 (1982) and the claim was deemed abandoned and void. Appellant relocated the Statler Mine No. 2 lode mining claim on November 24, 1979. The Statler Mine No. 1 lode mining claim was located by appellant on February 4, 1979, on lands previously covered by claims which apparently have been abandoned. Both claims contained underground workings excavated prior to the date of appellant's location.

At the request of the Forest Service, the Oregon State Office, BLM, initiated a mining claim contest by filing a complaint on March 4, 1985. The complaint charged that "[m]inerals have not been found within the limits of the claims in sufficient quantities to constitute a valid discovery." The contestee filed an answer and a hearing was conducted before Judge Mesch in Baker, Oregon, on August 22, 1985.

At the hearing, a mineral examiner employed by the Forest Service testified that he had examined the claims on two occasions. He noted that during the course of his examination of the Statler Mine No. 1 claim, he examined an old adit which was accessible for approximately 890 feet, and took eight samples at points along the adit. The samples were subsequently assayed and found to have gold values ranging from 0.006 to 0.682 oz/ton (Tr. 15, Exh. 2). He also testified that, when he diluted the highest assay to a 4-foot mining width, the assay did not represent "mineable material" (Tr. 16). The mine-width value of that assay was calculated be $ 22.71 per ton (Exh. 2). The mineral examiner noted that the width of the mineralization at that sample site was seven-tenths of a foot, and that width of the mineralization at the other sample sites was narrow (0.06 to 4.50 feet) (Exh. 2, p.3). The mineral examiner was unable to discern whether the Statler Mine No. 1 adit had ever yielded production (Tr. 33).

The Statler Mine No. 2 claim contains "an attractive old cabin in a parklike setting * * * and an old building, which is largely collapsed, containing some milling equipment" (Decision at 3). Preexisting underground workings on the Statler Mine No. 2 claim were caved and inaccessible at the time of inspection (Tr. 25). Being unable to gain access to the Statler Mine No. 2 adit, the mineral examiner took grab samples from a dump and at the portal (Tr. 20, 25). These samples showed negligible values (Exh. 3). Having observed no additional site he deemed to have sufficient mineral showing to warrant sampling, the mineral examiner concluded that the Statler Mine No. 2 contained no evidence of valuable mineral of sufficient quality or quantity to support a discovery (Tr. 22).

Contestee's witness, who had no formal training but considerable experience in mining and mineral extraction, testified regarding his examination of the claims. During the course of his examination he excavated a portion of the caved adit on the Statler Mine No. 2 claim and took samples. However, the assay values for those samples were not available at the time of the hearing (Tr. 67). He testified that, based upon his examination, he did not have enough data to determine whether it would be prudent to develop a mine on the Statler Mine No. 2 claim, but that "it would be prudent to expend further resources to find out just exactly whether or not it is a[n] operable property" (Tr. 80), and "there's at least sufficient evidence there for a prudent miner to spend money to find out whether or not there is more there" (Tr. 96).

Appellant offered in evidence reports indicating historical activity and exploration in the immediate area prior to 1937 (Exhs. D, E). These reports indicated that gold veins in the area were erratic in size and gold content. Appellant also introduced a report on the geology of the Statler Mine adit on the Statler Mine No. 1 claim, prepared by the Elkhorn Services Company (Elkhorn Report, Exh. F). However, Judge Mesch indicated at the time of the hearing he could not give the report much weight because the author of the report was not present to testify or be cross-examined (Tr. 57). 1/

1/ On rebuttal the mineral examiner testified regarding unanswered questions raised by the Elkhorn report, including questions as to sampling methods, value calculations, and the basis of the conclusions (Tr. 102-04).

Appellant also submitted evidence that in 1980 and 1981 the Forest Service had asked him to remove his cabin and questioned the validity of his claims (Exhs. B, C).

In his decision dated January 31, 1986, Judge Mesch concluded, based on the testimony and evidence, that the claims were not supported by a discovery of a valuable mineral deposit as required by the mining laws. Therefore, he found the claims to be invalid.

In his statement of reasons (SOR) for appeal, appellant alleges two primary points of error. First, appellant argues that Judge Mesch incorrectly analyzed the geologic and economic evidence. Second, appellant asserts that Judge Mesch applied an improper standard of discovery of a valuable mineral deposit.

Appellant emphasizes that these claims have a history of production through the 1930's. Appellant highlights the BLM examiner's observation of a 0.7-foot wide vein of ore containing 0.68 ounces of gold and argues that gold of this grade could be profitably mined. Appellant cites the "Elkhorn Report," at pages 4 and 5, to show the likelihood of mineralization near the Government samples on the Statler No. 1 claim. Appellant urges that the Government estimates of milling costs were excessive. Appellant appended a list of assay results derived from the Government mineral examination and the Elkhorn report and calculated mineral values based on present and historic high values and a 2.5-inch wide vein 500 feet long. 2/ Appellant urges on appeal that lead, copper, zinc, and molybdenum should be taken into consideration in the determination of the existence of a discovery (SOR at 5). However, during the course of the hearing appellant introduced no evidence or testimony regarding the existence of lead, copper, zinc, and molybdenum on the property at the time of the hearing. We can find no fault with Judge Mesch's failure to consider these minerals. Appellant had an opportunity to submit evidence of their existence and values, but failed to do so. Appellant cannot now make this allegation in an attempt to find error in the underlying decision.

Appellant also presents a brief of the law of discovery in support of his conclusion that "the substantive law of the development rule needs also to be readjusted to take into consideration a level of discovery that warrants protection while being 'explored' or 'developed.'" Appellant urges the

2/ As noted previously, the report can be given little weight. In that the calculations presented are based on the report, they too cannot be afforded much weight. Notwithstanding that fact, we would be unable to accept the figures as being representative of the value of the mineralization. The "average" value submitted by appellant is apparently a numeric average. The proper method of calculating the average grade would be a weighted average. With the erratic nature of width and contained values in the vein being demonstrated by both the Forest Service and Elkhorn exhibits, the numeric average can be given little weight. In addition, the minable values based upon a reasonable mined width are not represented by the in-vein values when examining a narrow vein.

Board to apply a less stringent standard similar to that applied in Clipper Mining Co. v. Eli Mining & Land Co., 194 U.S. 220, 225 (1904) (SOR at 9, 14).

Appellant alleges the contest was initiated inappropriately because of his "attractive old cabin in a park-like setting on the [Statler Mine No. 2] claim" (Decision at 3), and because he is a real estate businessman, who lacks mining experience (Decision at 3). Appellant claims the Administrative Law Judge was prejudiced against a positive finding and was predisposed to eliminate appellant's occupation of the claims.

In its response, BLM notes that appellant has raised new factual and legal arguments not raised at the hearing, citing a report appended to the SOR which was not entered in evidence at the hearing. BLM finds it inappropriate for the Board, as an appellate tribunal, to consider appellant's proffered new evidence and new theories of law. 3/ Stern v. United States Gypsum, Inc., 547 F.2d 1329 (7th Cir.), cert. denied, 434 U.S. 975 (1977); Edgar W. White, 85 IBLA 161 (1985).

[1] There is no question that the validity of any mining claim is dependent upon the disclosure of a valuable mineral deposit within the limits of the claim. 30 U.S.C. § 22 (1982). A valuable mineral deposit exists if the mineral found within the limits of the claim is of such quantity and quality that a prudent person would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a paying mine. United States v. Coleman, 390 U.S. 599, 602 (1968); Chrisman v. Miller, 197 U.S. 313 (1905); Castle v. Womble, 19 L.D. 455, 457 (1894). This "prudent man" test has been refined to require a showing that "as a present fact, considering historic price and cost factors and assuming that they will continue, there is a reasonable likelihood of success that a paying mine can be developed." In re Pacific Coast Molybdenum, 75 IBLA 16, 29, 90 I.D. 352, 360 (1983). However, actual successful exploitation need not be shown -- only the reasonable potential for it. Barrows v. Hickel, 447 F.2d 80, 82 (9th Cir. 1971). The question is not whether a profitable mining operation can be demonstrated, but whether, under the circumstances and based upon the mineralization exposed, a person of ordinary prudence would expend substantial sums with the reasonable expectation that a profitable mine might be developed. Barton v. Morton, 498 F.2d 288 (9th Cir. 1974).

When the United States contests a mining claim on the basis of a lack of discovery, it bears only the burden of going forward with sufficient evidence to establish a prima facie case on the charges in the contest complaint. When, as in the case before us, the Government examiner, who has had sufficient training and experience to qualify as an expert witness, testifies he has physically examined a claim and found mineral values insufficient to indicate the discovery of a valuable mineral deposit, the United States has

3/ Although we would agree with counsel that it would generally be improper for this Board to consider evidence not tendered at the time of hearing, we do not find a similar problem regarding issues of law. Appellant may raise these issues, and, of course, counsel for the Forest Service has the opportunity to respond.

established a prima facie case that the claim is not supported by a discovery. United States v. Ledford, 49 IBLA 353 (1980). Once a prima facie case is presented, the burden then shifts to the claimant and it is incumbent upon the claimant to present evidence which preponderates sufficiently to overcome the Government's case on the issues raised. United States v. Springer, 491 F.2d 239, 242 (9th Cir.), cert. denied, 419 U.S. 834 (1974); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); Cactus Mines, Ltd., 79 IBLA 20 (1984); United States v. Rice, 73 IBLA 128 (1983).

[2] Appellant contends that the low values found by the BLM examiner were not representative of the mineral in place on the Statler No. 2 claim, and alleges that representative samples were located at points other than those at which the samples were taken. It is incumbent upon a mining claimant to keep his discovery points available for inspection by Government mineral examiners. When he does not, he assumes the risk that the mineral examiner will not be able to verify any discovery of an alleged valuable mineral deposit. United States v. Ubehebe Lead Mines Co., 49 IBLA 1 (1980). Government mineral examiners are not required to perform discovery work for claimants nor to explore beyond a claimant's workings. United States v. MacLaughlin, 50 IBLA 176 (1980). Notwithstanding this fact, the prima facie case may be overcome by an appellant's presentation of evidence demonstrating the existence of valuable minerals at other points on the claim. This was not done.

The testimony presented by the Government's expert witness established a prima facie case that no mineral deposits were exposed on the two disputed claims of such quantity that a prudent person would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a mine. All but one of the samples he took showed negligible gold content. A comparison of the expense of mining and milling with the meager values of gold in all but one of the samples reasonably leads to the conclusion that these claims do not contain a discovery of valuable mineral deposits. The nature and placement of the samples taken also demonstrated the erratic nature of the deposit.

Appellant claims that the Government examiner admitted taking "grab samples" from a "waste dump only" (Tr. 23), and that these samples cannot be used as evidence of a lack of discovery on the Statler Mine No. 2 claim. We agree that the evidence presented for the Statler Mine No. 2 claim, based upon grab samples, was weak. This being the case, appellant would have been able to overcome the Government's case by presentation of evidence that assays of samples taken from rock in place indicated the presence of valuable minerals of such quality to support a discovery. However, no evidence of the existence of valuable in-place mineralization on the Statler Mine No. 2 lode mining claim was presented at the time of the hearing.

[3] Appellant's witness testified that these claims contained sufficient mineralization to justify further investigation. However, appellant's witness did not introduce evidence to show that there was a reasonable expectation that the mineral in place could be extracted and marketed at a profit.

United States v. Weekley, 86 IBLA 1 (1985). The witness for appellant testified that, if there were 1,000 tons of material containing values equal to those shown in the highest assay he would find the expenditure of labor and means to develop a mine warranted. However, when asked if he could say if the quantity of the mineral in place was sufficient to do so, he stated that further investigation was necessary. 4/ Evidence of mineralization which may justify further exploration, but not development of a mine, does not establish the discovery of a valuable mineral deposit. United States v. Miller, 91 IBLA 245 (1986); United States v. Weekley, supra.

There must be a valid discovery at the time of a contest hearing. United States v. Alaska Limestone Corp., 66 IBLA 316 (1982). Although there may have been a valuable mineral deposit in 1937, appellant was unable to show that the deposit had not been depleted and thus failed to overcome the evidence that there was no discovery on the relocated claims at the time of the hearing.

[4] Appellant insists that this mining contest was improperly motivated. The motivation of a Government agency when initiating a contest against a mining claim is irrelevant to a determination of the existence of a discovery, as a discovery is necessary to the continuing validity of an unpatented mining claim. The fact that such contest challenges the validity of certain mining claims and not of others in the same general area does not constitute a denial of due process.

The Board of Land Appeals cannot abnegate its responsibility to determine the validity of a mining claim when that issue is properly presented. Had BLM wished to charge that appellant's claims were not located in good faith because they were located for purposes other than for mining development, BLM could have so charged in the complaint. United States v. Weekley, supra; see United States v. Zimmers, 81 IBLA 41 (1984). These mining claims were properly declared null and void upon a showing of lack of discovery of a valuable mineral deposit upon the claims and appellant's failure to overcome that showing. United States v. Morton, 32 IBLA 263 (1977); United States v. Howard, 15 IBLA 139 (1974).

The Administrative Law Judge correctly concluded that discovery of a valuable mineral deposit was not shown within the limits of the Statler Mine Nos. 1 and 2 lode mining claims.

4/ We note that the conclusion in the Elkhorn report is that "[f]urther exploration efforts should be undertaken."

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision is affirmed.

R. W. Mullen
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

John H. Kelly
Administrative Judge